No. 16554

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN FRANCIS DEVINE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

I.
JURISDICTIONAL STATEMENT.

On March 4, 1959 an indictment was filed against appellant in which the Grand Jury for the Southern District of California charged him in three counts with violations of Section 1702 of Title 18, U. S. C. Count One charged him, in effect, with taking, on February 21, 1959, a letter addressed to the "Hays Company, 311 East Fourth Street, Los Angeles 13, California," which theretofore had been in a post office, with design to obstruct the correspondence of and before being delivered to said addressee. Count Two charged a similar offense on February 21, 1959, but with respect to a letter addressed to "Irving Blitz & Associates, 421 South Wall Street, Los Angeles 13, California." Count Three also charged a similar offense on February 21, 1959, but with regard to a letter addressed to "Philip Jaffe, 338 East Fourth Street, Los Angeles 13, California" [Clk. Tr. 2, 3].

The District Court had jurisdiction of the cause under Section 3231 of Title 28, U. S. C., which confers on all District Courts original jurisdiction "of all offenses against the laws of the United States."

The case proceeded to trial on April 14, 1959 before the Honorable Harry C. Westover, District Judge, and on April 15, 1959 the jury rendered a verdict against appellant of guilty on all three counts of the indictment. On May 8, 1959 appellant, having been under the supervision of the local probation officer after serving time on a prior conviction of a similar offense [Rep. Tr. 274], was sentenced to the custody of the Attorney General for a period of five years for the offense charged in Count One of the indictment and for a like term on each of the other two counts, the sentences on Counts Two and Three to run concurrently with the sentence imposed on Count One. A Judgment and Commitment was filed on the same day. A Notice of Appeal was filed on May 19, 1959. The Notice of Appeal recites that the Judgment and Commitment was entered on May 11, 1959.

Jurisdiction of this Court stems from Section 1291 of Title 28, U. S. C.

II.

STATUTE UNDER WHICH THE APPELLANT WAS PROSECUTED.

Section 1702 of Title 18, U. S. C., provides in pertinent part as follows:

> "Whoever takes any letter, postal card, or package * * * which has been in any post office * * * before it has been delivered to the person to whom it was directed, with design to obstruct the correspondence * * * shall be fined not more than $2,000 or imprisoned not more than five years, or both."

III.

STATEMENT OF THE CASE.

As indicated above, this case proceeded to trial on April 14, 1959, before Judge Harry Westover, and a jury was impanelled [Rep. Tr. 7]. Before an opening statement was made by Government counsel, the Judge admonished the jury that the case was to be decided solely from the evidence which would be admitted. The Court further stated that the attorneys had a right to make an opening statement at the beginning of the case but that it consisted primarily of a statement of the attorneys as to what "they expect to prove." It was said that no statements of the attorneys would be evidence in the case and were only opinions as to what the evidence would be [Rep. Tr. 8].

Government counsel then made an opening statement which gave the general scope of the evidence to be offered against appellant. Since it was only a statement as to an expectation of the facts which would be proved, it was not stated whether the ultimate facts were to be proved by direct evidence or through proper inference based on circumstances to be brought out during the trial, or both [Rep. Tr. 9-12].

On April 14, 1959, at the end of the day's Court proceedings, after the jury had left the courtroom, Judge Westover discussed instructions with counsel. The Court stated that the United States Attorney had offered certain special instructions which he thought were "pretty near the crux of the case." Judge Westover stated that he was satisfied that "delivery" was "manual" delivery to the addressee. He then invited counsel to bring in any other authorities which were pertinent to that subject [Rep. Tr. 108-109].

The next day, April 15, 1959, the Government rested its case [Rep. Tr. 176].

Shortly thereafter, appellant made a Motion for Judgement of Acquittal, "based mostly on what is 'deliver' ". Appellant's argument more or less followed the line that there was no showing he was not entitled to receive the various letters "perhaps as an authorized agent by any of the members of that company or, as I said, as a partner or member of the association itself." Counsel for appellant further stated at that time "* * * it may be a technical point * * *". After argument was heard, the Court denied the Motion for Judgment of Acquittal [Rep. Tr. 177-182].

Appellant, John Francis Devine, then took the witness stand and was the only witness offered on his behalf. Thereafter the Government called two other witnesses in rebuttal and rested [Rep. Tr. 231].

Counsel for appellant then renewed the Motion for Judgment of Acquittal on the same basis on which he had presented his original motion. It was denied by the Court [Rep. Tr. 232].

Counsel for both the Government and appellant then made their arguments to the jury [Rep. Tr. 233-253], and the Court gave its instructions [Rep. Tr. 253-269]. The Court inquired as to whether the Government had any objection to the instructions and, being informed that the Government had not, directed the same inquiry to appellant. Counsel for appellant stated that he had no objection and offered no further instructions [Rep. Tr. 269].

IV.
SUMMARY OF THE FACTS.

Since appellant had stated that one of the questions raised on appeal is whether "under the indictment and in the light of the presumption of innocence, there was delivery of the letters, etcetera, to the person(s) to whom they were directed," the Government feels that a résumé of certain portions of the testimony would be helpful to the Court.

The first witness called by the Government was Ralph A. Walter, a mail carrier so employed for 13 years. He was on duty Saturday, February 21, 1959 and his route in distributing mail was near Fourth and Wall Streets. The mail carrier looked at certain photographs, particularly one for the door of 421 South Wall Street, where Mr. Blitz was the addressee, and another for the doorway of the Western Frame Company located upstairs at 421½. (The address at 421 South Wall Street is involved in the charge set forth in Count Two of the indictment and the Western Frame Company at 421½ South Wall was involved in a "similar offense" on which the Government in its opening statement told the jury evidence would be offered, but only on the question of showing the intent and knowledge of the defendant in connection with the other three offenses.) The carrier testified that on Saturdays during February 1959, he made just one delivery about 8:30 in the morning and would have mail for every stop, including both Western Frame and "Blitz" [Rep. Tr. 14, 15, 18]. Mr. Walters testified that when he dropped mail in Mr. Blitz's place of business he put it through a "regulation mail slot" (which was called to his attention on the photograph) and the mail then fell on the floor. With respect to Western

Frame Company, which was not open on Saturdays, the carrier would push the mail underneath the door. In other words the carrier would push the mail through "this little crack" which was called to his attention in Exhibit No. 2, one of the photographs [Rep. Tr. 16].

This witness then testified that with respect to Monday through Friday during the week, he would go inside the door and put the mail for Western Frame in a "regulation" mailbox, which had a slot in the front where the mail went in [Rep. Tr. 17].

The Government called another letter carrier who had been so employed for twelve years and who also had a route near Fourth and Wall in Los Angeles [Rep. Tr. 19, 20]. On Saturday, February 21, 1959 this witness, Frank Harding, was working on his route and saw appellant [Rep. Tr. 20, 21], who was standing in the doorway at 356 South Los Angeles Street, the business being closed on that day and the door locked. The carrier had previously seen a photograph in the possession of inspectors, and therefore recognized appellant. As the carrier approached 330 South Los Angeles Street, he looked to his right and saw the appellant trying the door knob at the 360 address. He further stated that the company at that address was called "David of Hollywood" and that there was another one called "The Field Company". Further, this witness had never met appellant personally before this, although he had been on that route approximately a year and a half. [Rep. Tr. 22, 31, 33].

The witness made a couple of other stops and then proceeded to another address where he asked to use the phone for the purpose of notifying the inspectors that "the gentleman they were looking for was on the route." [Rep. Tr. 22, 23].

This witness was asked to look at Government's Exhibits 4 and 5 and he recognized them as photographs of the Jaffe Company door both from the inside and outside. He stated that he delivered mail to the Jaffe Company on his route and made only one stop on Saturday. On that day he normally arrived there between 9:00 and 9:15 in the morning. He remembered that he had actually delivered mail there on Saturday, February 21st. The Jaffe Company was locked up on that day, and the mail carrier knew it because he always tried the door to see if there was someone there. There was no one there on that Saturday. When passing by the front of the company's door one could see down on the floor and see if there was any mail there because of a window in the door. The mail would fall through a slot in the door on to the floor [Rep. Tr. 24, 25, 26]. The store, operated by Philip Jaffe, 338 East Fourth Street, Los Angeles 13, California, is the location mentioned in Count Three of the indictment.

This carrier also testified that the Hays Company, 311 East Fourth Street, mentioned in Count One of the indictment, was on his route. The mail slot in the door of the Hays Company, as shown in Exhibit No. 6, was up by the door latch over to the side about three feet above the ground. That is where the carrier put the mail unless there was someone there. On that occasion he would open the door and then go in. The center of the door frame was made of glass so that one could look through the door and see the spot where the mail would land on the floor. The witness remembered that he had actually delivered mail to the Hays Company on Saturday, February 21, 1959. On that occasion the door was locked and the sign said "Closed". There was no one actually at the

Hays Company on that day. He testified that he normally shook the door to see if he could get in and hand the mail to a person inside.

The Hays Company was not very far away from the Jaffe Company, that is, down the street on the opposite side. For the location of the Hays Company the witness put a number 2 on the map, Exhibit No. 3, and for the location of the Jaffe Company he put a number 3 on that exhibit [Rep. Tr. 25-28].

As Mr. Harding went about delivering his mail on his route, he thereafter saw Mr. Frank Carey, a post office investigative aide, in the vicinity. Mr. Carey was in an automobile, accompanied by someone else.

Irving Blitz was then called by the Government. He was an importer located at 421 South Wall Street. The name of the company was Irving Blitz & Associates. He looked at Exhibits 1 and 2 and testified that the double door on number 1 was to his business establishment [Rep. Tr. 35]. Western Frame was located next door. This witness remembered that on February 21, 1959, he was out-of-town and the latch on his door was locked. He testified that his mail was put through a door slit on the left-hand door of the double doors. The floor on the inside of the store was practically even with the floor on the sidewalk outside and there was about an inch between the floor and the bottom of the door [Rep. Tr. 36, 37]. The witness then looked at Exhibit No. 7 which was a check payable to "Irving Blitz & Associates" in the amount of $284.20 and testified that he had never received this particular check in his hands. He stated that the check related to an invoice which billed Service Exchange for that amount for 24 transistor radios which had been shipped to the latter company three weeks prior

to the check coming into his place [Rep. Tr. 39]. He stated that he got another check from Service Exchange after the post office authority had notified him it was missing. The check was cancelled and another one issued in its place [Rep. Tr. 39].

Mr. Philip Jaffe took the stand and testified he was a wholesale jobber at 338 East Fourth Street, that Exhibits 4 and 5 were pictures of double doors on his establishment from the inside and the outside. On Saturday, February 21, 1959, he was not at his place of business and his doors were padlocked. There was a space of about a quarter of an inch underneath between the bottom of the door and the floor. The door had a glass center so that one could look through it and see whether or not there was mail on the floor. When the mail went through the slot in the door it fell only about 12 to 15 inches away from the door itself [Rep. Tr. 45-48, 52, 53].

With respect to Exhibits 10 and 11, which were advertising brochures from the Astra Trading Corporation in New York City, Mr. Jaffe testified that he had in the past received circulars from that corporation but that those two exhibits had never been in his possession. He did not get any mail on the Monday following the 21st. On Exhibit No. 12, an envelope from the Portland Check Room, he never received that letter into his hands [Rep. Tr. 48, 49]. Inside there was a check for $85.00 which was dated February 19, 1959. Mr. Jaffe gave some testimony with respect to the business transaction with the Check Room which accounted for the payment [Rep. Tr. 50, 51].

On cross-examination Mr. Jaffe testified that he had received another check in lieu of the one that was contained in the envelope, since the postal authorities had

advised him that they had some of his mail in their possession and they told him one of the letters was from the Portland Check Room [Rep. Tr. 52].

Bert Goldner, a manufacturer of picture frames at 421½ South Wall Street, was called as a Government witness. His attention was directed to Exhibit No. 2 where the words "Acme Frame Company" appeared. That was the former name of his business which was being changed to Western Frame.

On Saturday, February 21, Mr. Goldner came into his place of business about noon. The door had been locked prior to the time he came in. There was a space underneath the door in Exhibit No. 2, which was about one-half inch high.

Mr. Goldner testified that Mr. Devine was not employed by his company, that he had never seen appellant before the time of trial, nor had he had any business dealings with him. The witness then went on to testify with respect to Exhibit No. 9, a check from the United States Rubber Company, dated 2-16-59 from New York, for the sum of $49.66. The name of the payee appeared to be obliterated but the address seemed to be 421 Wall Street, Los Angeles, California. On the reverse side the apparent handwritten endorsement "John F. Devine" is to be seen. He testified that the endorsement on the reverse side was not his and he had never given anyone the authority to place that endorsement on that exhibit [Rep. Tr. 62, 63, 65, 66]. Mr. Goldner's testimony showed that he had had a business transaction with the U. S. Rubber Company in New York in which a payment was due to Western Frame of $49.66. The New York company issued a duplicate check to Mr. Goldner when he advised them the postal authorities had possession of the original check [Rep. Tr. 59-61].

Gene Yamamoto was an accountant for the Hays Company at 311 East Fourth Street [Rep. Tr. 57], and was employed by them on Saturday, February 21, 1959 [Rep. Tr. 81]. The company was normally open on Saturday and on the above date the witness thought that someone came in close to noon. When no one was at the shop on Saturdays the front door was locked [Rep. Tr. 81].

Government's Exhibits 13 through 19 represented books and records for the Hays Company relating to February 21, 1959. The witness was also shown Exhibit No. 6, a picture of the front door of the Hays Company [Rep. Tr. 68]. He testified that there was about a quarter inch opening between the front door and the closest part of the floor underneath that door. There is a mail slot shown in the picture through which the mail was inserted. If one stood outside the door and looked through the glass in the door, the place where the mail falls after it is put through the slot could be seen [Rep. Tr. 69]. Mr. Yamamoto then went on to testify with respect to a transaction had by the Hays Company with Balfour-Guthrie & Company [Rep. Tr. 69-74]. It related primarily to Exhibit No. 13, which was called a Notice of Arrival [Rep. Tr. 70].

The witness's attention was called to Exhibits 18 and 19, the former being an envelope with the Pringle Drug Company return address on it and the latter being a check from the same drug company payable to the Hays Company for $11.17, dated February 19, 1959. Mr. Yamamoto then went on to testify with respect to a transaction by the Hays Company and Pringle Drug which involved approximately that sum of money. He stated that his company had not received Exhibit No. 19, the check, through the mail [Rep. Tr. 74-76, 78].

Certain other witnesses were thereafter called, primarily to show the mailing of Exhibit 19 to the Hays Company by the Pringle Drug Company, the mailing of Exhibit 13, the Notice of Arrival, to the Hays Company by Balfour-Guthrie & Company in San Francisco, the mailing of Exhibit 12 containing the check dated February 19, 1959, for $85.00 from the Portland Check Room in Stockton, California, to Philip Jaffe at Los Angeles, and the mailing of Exhibit 17, a check dated February 19, 1959, for $284.20 from Service Exchange Distributors in San Francisco to Mr. Blitz in Los Angeles [Rep. Tr. 82-105].

It is to be noted that in each instance the above pieces of mail were mailed out in connection with business transactions of the Hays Company, Irving Blitz & Associates, and Philip Jaffe. Mostly, goods had been ordered and shipped and the senders of the checks had mailed them in as payment.

The same was true with respect to the transaction involving Western Frame, where a witness was called from United States Rubber Company in New York to testify with respect to Exhibit No. 9, a check payable to Western Frame Company in Los Angeles [Rep. Tr. 112-117]. That witness had no accounts payable to John F. Devine or John Francis Devine at or near the time in question.

Frank R. Carey, an investigative aide with the Postal Inspection Service testified he was not on duty on Saturday, February 21, 1959 but did meet Mr. Padgett, a post office inspector, on that day after receiving a telephone call from a post office employee [Rep. Tr. 122, 123]. The two men went to the vicinity of Winston and Los Angeles Streets shortly thereafter, as shown on the map, Exhibit No. 3. A few minutes later they saw Mr. Hard-

ing, the post officer carrier who had previously testified in the case. The carrier was delivering mail on Fourth Street at the time the two men saw him. Mr. Carey and Mr. Padgett drove east on Fourth Street and shortly thereafter also saw appellant, John Francis Devine. At that time he was between Winston and Los Angeles Streets. Mr. Carey indicated with a dotted pencil line the places and directions which appellant was traveling [Rep. Tr. 124, 125]. By looking at the exhibit and reading the testimony given by this witness, it is apparent that appellant did a considerable amount of walking around in the vicinity of Los Angeles and Fourth Streets [Rep. Tr. 121-130]. On at least one occasion, appellant retraced his own path [Rep. Tr. 129].

Finally, after trying to keep track of appellant for a while, Mr. Carey parked his car near Fourth and Wall and he and Mr. Padgett got out. The neighborhood there was predominantly business, mercantile wholesalers, some printing establishments and jobbers.

As the two men got out of the car, appellant had just turned the corner at Winston and Wall and started coming toward them [Rep. Tr. 130]. Shortly thereafter, Mr. Carey and Mr. Padgett noticed appellant stop about a quarter of a block North of Winston on the West side of Wall Street, near the address of 421 Wall Street [Rep. Tr. 131]. Apparently appellant paused for several minutes at the spot where the two post office men had first seen him. They kept him under observation and noticed that appellant was standing very close to the store front [Rep. Tr. 133-135].

Appellant finally walked up to the corner of Fourth and Wall and stood on the stoop of a store there. A picture of the stoop was contained in Exhibit No. 23.

At that point appellant took what appeared to be a letter out of his pocket, opened it and threw it down on the sidewalk [Rep. Tr. 135, 136]. Mr. Carey actually walked by appellant at this time and saw that the envelope resembled Exhibit 8, the Service Exchange letter with the blue and yellow return address [Rep. Tr. 171, 138, 139].

The two post office men walked around a little and then approached closer to appellant. He had walked across the street from the store stoop and was on the Northwest corner of Fourth and Wall; he appeared to have some envelopes in his hand. There they saw him open something that had a rather orangish enclosure [Rep. Tr. 137]. The orange enclosure resembled one of the papers attached to Exhibit No. 16 [Rep. Tr. 138], and he threw it in the gutter [Rep. Tr. 139-140].

The witness was shown pictures of the Jaffe Company, Exhibits 4 and 5, and stated that he had passed by the Philip Jaffe establishment on that day. Mr. Carey looked in through the glass windows at that address and noticed that there was mail on the floor just behind the door. At that time he was walking along East on Fourth and appellant was behind him. Mr. Carey and Mr. Padgett continued to the corner of Fourth and San Pedro, crossed to the Northeast corner, and stepped inside an open door a few doors down. The street jogs at that point slightly and they watched the appellant from their post inside the doorway. They had crossed the street in getting to that doorway and were able to observe the appellant as he was proceeding in their direction across the street [Rep. Tr. 140, 141].

As the witness and his companion continued to observe appellant, the latter stopped in front of the Jaffe Company and backed up against the doorway. "He kept doing

something with his feet. We couldn't tell just exactly what, but he kept shuffling his feet around." During this maneuvering, appellant stooped over. There were some pedestrians passing by, and when some one would walk past him, he would stop any motions and just stand there. Appellant watched the passers-by proceed down the street and then would start manipulating his feet and bending over. He actually bent over several times and fumbled around at the bottom of the door. This went on about five minutes. *Mr. Carey then saw appellant pull a white envelope out from under the door.* Exhibit 4 was a photograph and was taken from the exact point where the witness and Mr. Padgett had the man under observation [Rep. Tr. 142, 143]. During all this time Mr. Carey had no difficulty in watching appellant or seeing what he had in his hand and there was no obstruction of the witness' view of appellant. Mr. Carey stated that on the last time the appellant stooped over "he fumbled around a little bit and the letter came out. He was facing our direction and he took the letter out with his left hand" [Rep. Tr. 143, 144, 162-164].

Appellant got the above-mentioned letter from the area at the bottom of the door, that is, between the bottom of the door and the sidewalk. After he came up with the envelope, he put it in his pocket and walked east on Fourth Street to the corner of San Pedro, South on San Pedro to Fifth Street. Shortly thereafter, Mr. Carey and Mr. Padgett apprehended appellant at the corner of Fifth and San Pedro Streets [Rep. Tr. 144, 145].

When the defendant was apprehended he had Exhibit No. 12, the letter addressed to Philip Jaffe, 338 East Fourth Street, in his hand, unopened. Appellant handed Mr. Carey the letter and admitted that he knew who

the witness and his companion were. Appellant said, "I want to go back to jail." When asked if he had any other mail, appellant said, "Yes," that he would give it to Mr. Carey in a minute. As the three men started to walk back to where the car was parked, appellant pulled two additional letters out [Exs. 10 and 11] and handed them to Mr. Carey [Rep. Tr. 147, 148].

On their way back to the car the men stopped in front of Jaffe's. The two post office men asked appellant if that was where he got the mail. Appellant said "Yes." Shortly thereafter, Mr. Clifford drove up and stopped and got out of his car and came to where the other three men were standing. They all started walking toward Mr. Clifford's car, the witness walking a short distance behind appellant. As they continued on, the witness saw appellant drop what appeared to be a crumpled piece of paper out of his pocket. It was Exhibit 9, the United States Rubber Company check, *crumpled up in a ball.* Thereafter Mr. Carey left Mr. Clifford and Mr. Padgett with Mr. Devine to return to pick up the material which they had seen appellant throw away previously at the corner of Fourth and Wall. At the Southwest corner of Fourth and Wall, Mr. Carey found Exhibit 8, the envelope from the Service Exchange Distributors. On the Northwest corner of Fourth and Wall in the street, Mr. Carey picked up at least two envelopes, Exhibit No. 18, a window envelope from the Pringle Drug Company, Exhibit 14, which was the Balfour-Guthrie, Ltd., envelope, and Exhibit No. 13, "Notice of Arrival." The exhibits had gotten wet on the street. The above exhibits were found within a couple of feet from where the appellant had been standing previously on those two corners.

Jack B. Clifford, an investigative aide for the post office testified that he saw Mr. Carey, Mr. Padgett and appel-

lant in the area of Fourth and Wall in the morning hours of Saturday, February 21, 1959 [Rep. Tr. 172]. This witness testified further that he went down to the Federal Building with the three men and found on the person of appellant Exhibits No. 7 and No. 19. No. 7 was a check payable to Irving Blitz and Associates in the amount of $284.20 from Service Exchange Distributors and Exhibit No. 19 was the check payable to the Hays Company in the amount of $11.17 from the Pringle Drug Company. They were both in the defendant's wallet [Rep. Tr. 173, 174].

It was after Mr. Clifford testified that the Government rested [Rep. Tr. 176].

Appellant took the witness stand in his own behalf and testified that his business was that of being a *cook* [Rep. Tr. 185]. After he had breakfast on the morning of February 21, 1959, he went out looking for work at any restaurant which had work to offer him [Rep. Tr. 186]. Appellant admitted walking down to Wall Street and standing in a doorway on Los Angeles Street [Rep. Tr. 187]. He also stated that he spoke to Mr. Harding, the mailman who had previously testified for the Government. He asked for work at some places but they did not have any to give him and told him to come back [Rep. Tr. 188].

Appellant denied seeing Government's Exhibits 7 to 21 before the time he took the stand to testify [Rep. Tr. 192, 193]. Appellant went on to testify as to his movements on the date and times in question, contending that he went to the blood bank, which was closed, and described his various movements standing around and walking in the neighborhood involved.

Appellant stated that after he was arrested by Mr. Carey he did not throw anything away and that Mr. Carey did not search him. Appellant contended that when Mr. Carey walked up "he (Mr. Carey) had stuff in his hand" but appellant did not know what it was. He further denied that he was taken back to Jaffe's after he was arrested and that he had been asked whether he took any mail from Jaffe's [Rep. Tr. 196-198].

Appellant then went on to give his version of what happened at the Federal Building, and stated that Mr. Carey came in with a lot of wet stuff in his hand [Rep. Tr. 198, 199]. Appellant denied that he had any checks at all in his wallet at the Federal Building [Rep. Tr. 201]. Devine stated that when he got up that morning he had no letters in his possession belonging to any one else [Rep. Tr. 202].

Under cross-examination appellant testified that on November 13, 1953, during November 1954 and in February 1956 he was convicted of three separate felonies [Rep. Tr. 205, 206]. He further testified that during the month of February 1959, *he was not employed at all* [Rep. Tr. 206, 207]. He again denied that he had any letter at all in his hand at the time the post office inspector came up to him near Fifth and San Pedro [Rep. Tr. 207, 208]. He said he had no "U. S. mail" in his possession at any time. He further denied that he ever had the U. S. Rubber Company check, Exhibit No. 9, in his possession. (That was the exhibit Carey testified he saw the appellant throw to the ground in a crumpled ball) [Rep. Tr. 209].

Appellant further claimed that with respect to Exhibits No. 7 and No. 19, the two above-mentioned checks, that Mr. Clifford never took them out of his wallet and the

checks were not in his wallet [Rep. Tr. 213]. When his attention was called to Exhibit No. 9, the United States Rubber Company check, appellant testified that the endorsement on the reverse side of the check "looks something like my signature." [Rep. Tr. 214].

After appellant testified, the defense rested and the Government called three witnesses for rebuttal purposes. Thereafter both the Government and appellant rested [Rep. Tr. 231].

In making opening arguments, Government counsel endeavored to explain the Government's position with respect to the manner in which the mail was extracted by appellant from underneath the doorway of the business houses, particularly Jaffe's door, as testified to by Mr. Carey and Mr. Padgett. Government counsel stated that obviously we did not claim that any one had actually tried to put his hand underneath the door [Rep. Tr. 235]. The jury's attention was directed to the photograph showing the various spaces underneath the doorway involved. Government counsel then argued that the "only reasonable inference you can draw is that the appellant had some way to get this mail out from underneath the doorway." In other words, the jury was asked to draw a reasonable inference from the evidence that the appellant had some method other than putting his hands or feet underneath the door to extract the mail from the other side. It was then that Government counsel stated "this isn't in evidence and I don't say the defendant had this, but . . ." At that point counsel for appellant objected to the fact "that an implement here" was going to be used that was not identified with the case. Government counsel then stated that she did not claim it was in the case and that she wanted to use it as an "illustration".

The Court then advised Government counsel that no reference should be made to anything except the evidence in the case and she was instructed not to refer to anything but such evidence [Rep. Tr. 236].

Counsel for the Government then indicated, in effect, that she would not waste her time for argument in any further discussion about the point and went ahead with the argument, abandoning the object she had started to use as an illustration. The remarks to the jury which immediately follows the above colloquy were then obviously only verbal appeals to the jury to draw reasonable inferences from the evidence in the case and no more.

> "Ladies and gentlemen, you can only get underneath a doorway where there is this space with some kind of instrument. There was this maneuvering of the appellant at the Jaffe store. Obviously, I think anybody could figure out that there was a little bit of maneuvering to get underneath the door of some kind, with a heavy strap or something that is firm enough to go in and rest on a letter. You can see these letters are fairly light. They are not heavy. They are fairly light. If you have got *something* on one of these letters from underneath the door where it is sitting on the door you could just manage to lay it on there and drag it out this way.
>
> "Obviously the defendant did just that because two men watched him come up from underneath the door with the letter." (Emphasis ours) [Rep. Tr. 236, 237].

Later in the Government's argument it was stated:

> "His whole story is another fabrication. He may have been out of work. Ladies and gentlemen, that

shows he was not certainly associated with any of these companies. He didn't own a half interest in all these companies so that he had those checks legitimately. That is against all of the weight of the evidence."

Counsel for appellant commenced his argument and endeavor to meet the Government's argument that Devine had been using some implement to drag the mail from underneath the doorways. He stated:

"If you look at the Jaffe doorway, he was standing almost flush with the street there shuffling his feet a little. How is he manipulating some wire contraption that the prosecution would have you think he used if those inspectors couldn't see the wire contraption? Where was it? They found everything else, but they didn't find that.

"Ever since he was at the Jaffe store they watched him. What happened if there was a wire there? How could he have it on his feet and use it and the inspectors not see him using it? But these inspectors were watching him. I think we have no evidence that there was any such thing going on." (Emphasis added) [Rep. Tr. 245, 246].

Later counsel for appellant argued:

"I think that the prosecution has shown you the Jaffe doorway. It is manifestly impossible to get either your feet or your hands through the crack or through a slit of any kind on these doors, and this is what they hang their case on, the taking of mail by shuffling in front of a locked door." [Rep. Tr. 248].

After argument was concluded the Court instructed the jury, and, among other things, stated that:

"There are two types of evidence from which a jury may properly find a defendant guilty of an offense. One is direct evidence, such as the testimony of an eye witness. The other is circumstantial evidence, the proof of a chain of circumstances pointing to the commission of an offense.

"As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that, before convicting a defendant, the jury be satisfied of the defendant's guilt beyond a reasonable doubt from all the evidence in the case.

"*Statements and argument of counsel are not evidence in the case,* unless made as an admission or a stipulation of fact * * *

"The evidence in the case consists of sworn testimony of the witnesses, *all exhibits which have been received in evidence,* all facts which have been admitted or stipulated, all facts and events which have been judicially noted, and all applicable presumptions stated in these instructions * * *

"*You are to consider only the evidence in the case.* But in your consideration of the evidence you are not limited to the bald statements of the witnesses. On the contrary, *you are permitted to draw, from the facts which you find have been proved, such reasonable inferences as seem justified in the light of your own experience.*

"An inference is a deduction or conclusion which reason and common sense lead the jury to draw from facts which have been proved." (Emphasis added) [Rep. Tr. 256, 257].

Later in the instructions the Court advised the jury that the statute under which the indictment had been returned was intended to protect letters, not only while they are in the physical possession of the post office but also until they are delivered to the person to whom they are addressed. The Court then went on to list the various elements of the offenses charged in each count and included therein was the following:

> "(3) That he took the letter before it was delivered to the addressee, * * *"

The jury was also instructed that

> "* * * this word 'delivered' means a manual delivery of a letter to whom it is addressed. In other words, it must actually reach the hands of the addressee.
>
> "* * * The defendant is not charged with stealing a check or document from any one. He is charged only with violation of Section 1702 of Title 18, U. S. C., which makes it an offense to take any letter, which has been in any post office, before it has been delivered to the person to whom it was directed.
>
> "Should you find that the defendant did not take such a letter or letters before delivery, you must find the defendant not guilty, even though you may find that he was in possession of, or had stolen letters, checks, or other documents which were the property of another." [Rep. Tr. 266-268].

When the instructions were completed counsel for the defendant stated that he had no objections to the instructions read to the jury. He offered no suggestions as to any additions to the instructions [Rep. Tr. 269].

V.

ARGUMENT.

In connection with appellant's argument on his first point on appeal, it is to be noted that at page 8 of his brief, he admits that Section 1702 of Title 18 contemplates "manual" delivery of mail to the addressee, and also that appellant had or took into his possession mail addressed to the parties named in the indictment, which mail had previously been in the custody of the "United States Mail." In the light of such admissions, appellant then propounds the theory that the Government's proof, taken together with the applicable presumption of innocence, establishes that manual delivery of the correspondence "to the person to whom it was directed, to wit, the appellant, was accomplished."

Implicit in appellant's contention is the urging that the Government failed to prove appellant had taken the correspondence in question before it had been delivered to the person to whom it was directed. Appellant impliedly states to this Court that such evidence could be shown either by direct or circumstantial proof, but, in submitting this rather narrow issue to the Court, appellant refers very little to the evidence which was adduced at the time of trial. When any such reference was made, it was only to the evidence offered by the Government, that is, that it appeared "that the prosecution failed to prove the elements of wrongful taking prior to delivery, * * *."

The Government respectfully submits to this Court that not only was overwhelming proof admitted during the Government's case that appellant was not connected with any of the addressees on the correspondence in question and that he thus took the mail with intent to obstruct the correspondence and before it had been delivered to

the person to whom it was directed, but that appellant is endeavoring to improperly limit the scope of review by this Court.

In *Gaunt v. United States,* 184 F. 2d 284 (1st Cir. 1950) appellant raised a contention with respect to the sufficiency of evidence as to wilfulness. The Court of Appeals pointed out at page 290:

> "The defendant by offering evidence on his own behalf elected to abandon his motion for acquittal made at the close of the Government's case and to rely upon a subsequent motion to the same effect made at the close of all the evidence, *United States v. Goldstein,* 2 Cir., 168 F. 2d 666, 669, 670; *Mosca v. United States,* 9th Cir., 174 F. 2d 448, 450, 451, and cases cited which he made, so that this later motion is the only one for consideration on this appeal. Hence the *sufficiency of the evidence as a whole* to establish the defendant's wilfulness *must be considered, not merely the sufficiency of the evidence offered by the Government alone* on that issue. And an examination of all the evidence convinces us of its sufficiency with respect to the defendant's wilfulness." (Emphasis added.)

It is apparent that the scope of review on appeal on a question of insufficiency of the evidence is not limited to proof adduced during the Government's case. The *entire* evidence in the case must be considered in determining whether or not the case fails with respect to proving the wrongful taking prior to manual delivery to the addressee.

In *Connolly v. United States,* 249 F. 2d 576 (8th Cir. 1957), it was very clearly brought out that:

> "In considering the question of the sufficiency of the evidence to go to the jury and to sustain the verdict *we must view the evidence in a light most favorable to the prevailing party,* in this case the Government, and the prevailing party is entitled to all such favorable inferences as may reasonably be drawn from the facts and circumstances proven. *If when so viewed, reasonable minds might reach different conclusions, then the issue is one of fact to be submitted to the jury and not one of law to be determined by the Court* * * *". (Emphasis added.)

In that case the appellant had contended the motion for judgment of acquittal or new trial should have been granted because the evidence was as consistent with innocence as with guilt.

The same point was made in the case of *Small v. United States,* 255 F. 2d 604 (1 Cir. 1958), where the appellant had moved for an acquittal at the close of the Government's case and also at the end of trial. The Court of Appeals stated that the issue before it was whether the evidence "viewed in the light most favorable to the Government was sufficient to support a verdict of guilty. * * *".

See also:

> *United States v. McNeill,* 255 F. 2d 387 (2d Cir. 1958).

Looking at *United States v. Nystrom,* 115 Fed. Supp. 500 (U. S. D. C., W. D., Pa. 1953), we find that:

> "The Court, in passing on a motion for judgment of acquittal, must determine whether upon the evi-

dence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inference of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. * * *

"In doing this the Court must assume the truth of the Government's evidence and give the Government the benefit of all legitimate inferences to be drawn therefrom * * *."

In *United States v. Sylvanus,* 192 F. 2d 96 (7th Cir. 1951), it was put in this fashion:

"* * * we conclude that it cannot be said that the trial judge should not have submitted the issue to the jury. This is not a trial de novo. We do not weigh the evidence but determine only that it was such that the Court did not err in denying the motion for acquittal."

Guided by the principles set forth in the above cases, this Court must look to the whole of the evidence to determine whether or not the proof failed in connection with one of the elements of the charges. A scrutiny of the entire case leaves no doubt but that it was *not* left up to surmise or conjecture that appellant was not one of the addressees to whom the items of mail were directed.

Turning to appellant's own testimony, it is significant to note that he never claimed to be associated in any way with the people or the firms to whom the correspondence was addressed. As a matter of fact, he said that he went out looking for work on the morning of February 21, 1959, right after he had breakfast. The work that he was searching for was not that connected with an importing business, such as Irving Blitz had at

421 South Wall Street, or with a wholesale jobber, such as Philip Jaffe was at 338 East Fourth Street, or with manufacturing picture frames which Bert Goldner did at 421½ South Wall Street or anything to do with the business of the Hays Company at 311 East Fourth Street. Appellant simply testified that his business was that of being a *cook*. He further testified that *he had not been employed at all during the month of February 1959.*

Appellant did not base his defense on an explanation as to why he had mail in his possession addressed to other firms or persons, but denied that he had had any letters or checks at all in his possession on that day.

Under the Court's instructions, the jury had to weigh the credibility of the witnesses, find the facts which actually happened and draw reasonable inferences from those facts. The question of whether or not the defendant had taken the letters before they were manually delivered to the addressee was submitted by the Court in his instructions to the jury as a question of fact. Now, on review, it is clear the evidence as a whole showed that reasonable minds could easily conclude appellant was not associated with any of the firms or persons to whom the correspondence was addressed, especially in the light of his own testimony. Even in the Government's own case, particularly since the evidence must be viewed in a light most favorable to the Government, the circumstances could only lead a reasonable mind to draw the inference appellant was a thief and not authorized in any way to receive the mail.

Mr. Walter, a post officer carrier, testified, in part, that on Saturdays during February 1959, he made just one delivery about 8:30 in the morning and would have mail for every stop, including both "Western Frame" and

"Blitz". He stated that when he dropped mail in Mr. Blitz's place of business he put it through the mail slot in the door and the mail then fell to the floor. Mr. Blitz himself testified that on February 21, 1959 he was out of town and the latch on his door was locked. He further testified that there was about an inch between his floor and the bottom of the door where the mail slot was located. Mr. Blitz never got the check for $284.20 which was received in evidence, but he got another check from the company which had mailed it to him after the post office authority had notified him of the crcumstances. Obviously since the check had been stolen, the original was cancelled and another one was issued to him in its place.

Another letter carrier who had a route in the general area of Fourth and Wall Streets in Los Angeles testified that he saw appellant on Saturday, February 21, 1959, and Mr. Devine was standing in a doorway at 356 Los Angeles Street. The business was closed there on that day and the door was locked. When the carrier saw appellant, the latter was trying the door knob at that address.

This carrier, Frank Harding, testified that he delivered mail to the Jaffe Company on Saturday, February 21, 1959 and that company was locked up on that day. The mail carrier always tried the door to see if there was someone there and there was no one at the place on that date. He further testified that when one would pass by the front of the company's door one could see down on the floor where the mail would drop through the slot in the door.

This witness also testified that the Hays Company was also on his route and he actually delivered mail to the Hays Company on Saturday, February 21, 1959. The door

was locked at that time and the sign said "Closed". As a matter of fact there was no one actually at the Hays Company on that day.

It is important to remember that each one of the firms concerned appeared to involve a different type of business. It is not reasonable to conclude, in view of the light of all the evidence, that a *cook,* who was out of work that particular month and looking for a job as a cook, could have been associated in any business way with four different types of enterprises. Further the 360 South Los Angeles Street address where the appellant was seen trying the door knob by one of the carriers contained two other companies called "David of Hollywood" and "The Field Company". It is also to be noted that the same carrier had never met the appellant personally before the date in question, although he had been on his route for approximately a year and a half.

Mr. Jaffe testified that the check for $85.00 was due to his store because of a business transaction with another firm. Mr. Blitz testified to a like effect. The same was true of the mail addressed to the Hays Company which was found by the post office inspectors. Mr. Yamamoto stated that it involved a business transaction had by the Hays Company with Balfour-Guthrie & Company. In other words, each one of the pieces of mail had to do entirely with the business affairs of each of the firms involved.

Mr. Jaffe also testified that he had received another check in lieu of the one which was contained in the envelope. This was because of the fact that the original check was missing. Certainly it cannot reasonably be said that a duplicate check would have been issued in these

instances if appellant had had any association with each company which would have warranted his receiving the checks.

As was the case with the Blitz Store, both the premises operated by Philip Jaffe and the Hays Company contained a door at the front of the establishment which was a certain space above the ground. Furthermore, the doors had glass centers so that in each case one could look through and see whether or not there was mail on the floor.

Not only were Blitz and Jaffe not at their stores on Saturday, February 21, 1959, the doors being padlocked, but there was no one at the Hays Company that morning. Thus, in each case, the defendant was found with correspondence which had been delivered that very morning to an establishment that was locked, no one being present on the premises. There was no testimony of keys being found on his person which would have gained him entrance to the doors and Mr. Devine himself did not claim to have such keys.

Not only does the testimony of appellant himself and the evidence showing the above facts demonstrate that appellant had no connection at all with the firms involved, but the testimony of the postal inspection service men showed his activities were not those of a person who was authorized to receive the mail, but rather one who was surreptitiously taking mail without authorization. Mr. Carey testified as to the appellant's movements on that day, which included a great deal of walking around the streets, even retracing his own footsteps on at least one occasion. In fact, it was so difficult for the men to keep track of appellant by automobile, that they finally got out of the car and observed his movements on foot.

Appellant finally walked up to the corner of Fourth and Wall and stood on the stoop of a store at that point. Mr. Carey actually walked by appellant at that point and saw him discard an envelope which resembled the Service Exchange letter (the check being later found on his person) since it had a blue and yellow return address on the upper left hand corner. Appellant then moved across the street to another corner on the intersection and the postal service men saw that he appeared to have some envelopes in his hand. He was seen to open something that had an orangish enclosure which he threw in the gutter. In other words, Mr. Devine was throwing away an enclosure which had business significance to the Hays Company. Later, when Mr. Carey went back to practically the same spot where appellant had been standing, he found other such exhibits. Here we find appellant in possession of correspondence which related to the regular course of various businesses carried on by these firms, throwing away certain significant material in the gutter. This hardly would have been the action of a person associated with any of those firms.

When Mr. Carey walked by the Philip Jaffe establishment on that day he looked in through the glass windows and noticed that there was mail on the floor just behind the door. At that time appellant was not too far behind him on the sidewalk. After Mr. Carey and Mr. Padgett continued to the corner of Fourth and San Pedro they stopped at a doorway and watched appellant.

As the two men continued to observe him, he eventually came up from the bottom of the door with a letter in his hand. In other words, he never went in the door, but managed to withdraw the envelope from outside the locked doors. Appellant was shuffling his feet in a maneuver to

withdraw mail which had fallen inside on the floor through the mail slot. The only inference which could be drawn is that he had injected some slender object underneath the crack in the door and managed to lay it over the mail. This being done the shuffling of his feet apparently brought the letters back underneath the crack in the door into his possession. When any pedestrians passed by, the post office men observed that appellant would stop the movements of his feet. When the coast was clear, so to speak, he would then start manipulating his feet again and bending over.

When appellant was apprehended, he had Exhibit No. 12, which was a letter addressed to Philip Jaffe at that address and it was still unopened. On the witness stand Mr. Jaffe opened it and it was found to contain a check. Appellant handed Mr. Carey the letter and said: "I want to go back to jail." When asked if he had any other mail he admitted that he did and said he would give it to Mr. Carey in a minute. He then pulled out two additional letters and handed them to the post office man. As they all started walking up the street, appellant drew out Exhibit No. 9, the U. S. Rubber Company check and *threw it on the street crumpled up in a ball.* It is also significant to note that when appellant spoke at that crucial moment, he made the statement "I want to go back to jail."

The only inference which could be drawn from all his actions as set forth above is that he had stolen the mail.

As indicated above, Exhibits No. 17 and No. 19, the other two checks, were found on appellant's person at the post office where he was taken after his arrest.

(It should be remembered that the sentences on each Count were concurrent. If any of the counts are affirmed, the conviction should stand).

The Court's attention is also directed to the fact that the crumbled check which appellant threw to the ground was one which the United States Rubber Company in New York had mailed to Western Frame Company in Los Angeles at 421½ Wall Street. That transaction was offered as a similar offense to prove intent and knowledge of the defendant in connection with the charges set forth in the indictment. In that particular instance, Government counsel did ask Mr. Goldner, who was the manufacturer of picture frames at that address, if Mr. Devine was employed by that company. Goldner testified Devine was not employed by his company, Goldner had never seen appellant before the trial and had never had any business dealings with him. The representative of the United States Rubber Company also testified that that firm had no accounts payable to John F. Devine or John Francis Devine. The name of the payee on the check was obliterated and on the reverse side thereof there appears to be the endorsement "John F. Devine." Appellant himself admitted that it looked like his signature. Mr. Goldner also testified that the endorsement on the reverse side of the check was not his and that he had never given anyone the authority to place that endorsement on the exhibit. The United States Rubber Company had issued a duplicate check to Mr. Goldner when it was ascertained that the postal authorities had possession of the original.

In the transaction involving the Western Frame Company, we then have a situation where a check was sent through the mail to Western Frame in a business transaction and not received by the addressee. The testimony was quite specific that Devine had no association with Goldner at all and yet the multilated check was found on Devine's person on Saturday morning, February 21, 1959.

Thus the appellant's intent to obstruct the correspondence of the various firms and persons named in the indictment before such correspondence had been delivered to the person to whom it was directed was bolstered by the evidence of the similar offense, where the evidence was quite specific as to his lack of association with the addressee.

While it is true that Government counsel could have easily disposed of this question on appeal by specifically asking each one of the addressees as to lack of association with appellant, such was not done directly, except in connection with the incident involving the Western Frame Company. It may well be that such specific questions were not asked on this point in connection with the witnesses Jaffe, Blitz and Yamamoto, because Government counsel was somewhat distracted on this point by the abundance of circumstances which could only lead to the conclusion that Devine was a thief, and not associated in any way with the three business houses. However, as appellant has stated in his brief, the elements of the offense can be proved by circumstantial evidence, as well as direct evidence, and that was done in this case.

In connection with the appellant's second point on appeal, he declares that the Court erred in refusing to declare a mistrial for prejudicial misconduct on the part of the prosecuting attorney.

It should be noted that appellant did not request the Court to declare a mistrial for alleged prejudicial misconduct on the part of Government counsel or ask for any remedial action at the time the incident occurred upon which this complaint is based. All that counsel for appellant stated was as follows: "Your Honor, counsel displays an implement here that has in no way been identi-

fied with this case. We have no evidence on it. I think this is highly prejudicial." Thus appellant complains of a failure to declare a mistrial, when no suggestion was made by him to the Court that such be done.

In any event, counsel for the Government, in endeavoring to illustrate the only reasonable conclusion which she contended could be drawn from the circumstances, particularly those which happened outside of the locked Jaffe doorway, stated to the jury:

> "Now, ladies and gentlemen, I think that the only reasonable inference you can draw is that the defendant had *some way* to get this mail *out* from underneath the doorway. *This isn't in evidence and I don't say the defendant had this,* but—" (Emphasis added).

Thereafter, in response to the above quoted remarks made by counsel for appellant, Government counsel further stated: *"I don't claim it is in the case.* I want to use it as an *illustration.* I can talk about it, anyhow" (Emphasis added).

The Court then went on to advise Government counsel that he did not think she should refer to anything except the evidence in the case. Judge Westover said "If you are referring to anything that is not in evidence, please don't do it." Counsel for the Government then told the Court that she would not waste time arguing the point and would proceed.

After the above mentioned colloquy between Court and counsel with respect to the implement which Government counsel only *started* to use as an illustration, counsel for the Government then proceeded to make the statement

quoted herein under the summary of facts. In effect she told the jury that anybody could figure out that the maneuvering of appellant at the Jaffe door was to get underneath the door some kind of a heavy strap or something that was firm enough to go in and rest on the mail. In this way, she argued, the implement could be laid on the letters so that they could be dragged out underneath the doorway.

Thus, when counsel for the Government was told by the Court not to refer to anything not in evidence, she refrained from proceeding with the illustration which she had started to use. Instead, she merely argued what were believed to be the only reasonable inferences from the circumstances which occurred. There was no objection to this argument by counsel for appellant. In fact, as shown before, he had the chance to, and did, make his own argument with respect to any alleged wire or contrivance which may have been put under the door [Rep. Tr. 245, 246].

As indicated above, counsel for the Government made absolutely no contention that the implement, with which she started to illustrate her argument, was in evidence or had been in the appellant's possession. Whether, on hindsight, it will be said to have been inappropriate or not, it can hardly be said to have been prejudicial to appellant in view of the fact Government counsel clearly made no claim it was in evidence and only started to use it as an illustration. Further, she continued in the argument without the object to argue the inferences which should have been drawn from the strong circumstances of guilt.

As also set forth in the summary of the facts, the Court instructed the jury that a conviction can be based upon circumstantial evidence, that is, a proof of a chain

of circumstances pointing to the commission of an offense. He further said that "Statements and arguments of counsel are not evidence in the case, unless made as an admission or a stipulation of facts, * * * you are to consider only the evidence in the case. * * *" The Court made similar statements when the case started.

When the instructions had been completed, counsel for the defendant stated that he had no objections to the instructions read to the jury. He offered no suggestions as to any additions to the instructions and appeared to be satisfied with them.

It appears that all of the evidence taken at the time of trial was overwhelming as to the guilt of the defendant on all three counts of the indictment. As shown above, the post office men themselves actually *saw* the defendant take a letter from the outside of the Jaffe door after engaging in surreptitious movements. Certainly it could not be said that, in the setting of the entire trial, a fleeting endeavor by Government counsel to *illustrate* a point by beginning to use an implement, could have made any difference in the verdict which was rendered by the jury. They were carefully instructed by the Court that they were to consider nnly the evidence in the case and that the statements of Government counsel did no more than to argue the inferences which should be drawn from those facts.

In presenting a case, a prosecuting attorney may make any reasonable comment on the evidence and may draw such inferences from the testimony as would support his theory of the case. The *Mellor* case, *infra,* involved certain statements made by the prosecutor and the Court further said that to constitute reasonable error, the

language used must have been plainly unwarranted and "*clearly injurious*". (Emphasis added)

Mellor v. United States, 160 F. 2d 757 (8th Cir. 1957).

In the case of *Sanders v. United States,* 238 F. 2d 45 (10th Cir. 1956), the prosecutor used a crowbar and a pinchbar, which had not been admitted in evidence, for the purpose of illustration. There the Court held that it was not error since the circumstances brought out during evidence were such as to lay a foundation for the use of such implements as *illustrations.*

See also:

United States v. DiCanio, 245 F. 2d 713 (2d Cir. 1957) cert. den. 355 U. S. 874;

People v. Caldaralla, 329 P. 2d 137, 163 A. C. A. 31;

People v. Cox, 76 Cal. 281, 18 Pac. 332;

People v. Durrant, 116 Cal. 179, 48 Pac. 75.

The above cited cases involved the use by the prosecution of some object to illustrate argument.

In conclusion, it is submitted that the verdict of this jury was only based upon the evidence, which, as indicated above, was overwhelming as to the guilt of appellant. The remarks made during opening statement were only those of ultimate fact which the prosecution claimed would be proved, not indicating whether it would be by force of circumstances or through direct evidence, or both. The instructions of the jury were apparently satisfactory to appellant at the time of trial and the incident complained of during closing argument was a minor incident during the course of the entire trial.

Counsel for appellant claims that no instruction of the Court could have possibly removed the prejudice which appellant's case suffered, but the Government submits that no prejudice was suffered. The illustration was immediately abandoned when the Court advised Government counsel not to refer to anything which was not in evidence.

Thus, it is urged that the conviction of the appellant below should be affirmed.

Respectfully submitted,

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